

1 JAMES V. FITZGERALD, III (State Bar No. 55632)  
2 NOAH G. BLECHMAN (State Bar No. 197167)  
3 McNamara, Dodge, Ney, Beatty, Slattery,  
4 Pfalzer, Borges & Brothers LLP  
5 1211 Newell Avenue  
Post Office Box 5288  
Walnut Creek, CA 94596  
Telephone: (925) 939-5330  
Facsimile: (925) 939-0203

6 Attorneys for Defendant  
JASON INGRASSIA

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

11 ABHINAV BHATNAGAR,

**Plaintiff,**

vs.

14 JASON INGRASSIA, individually and in  
15 his official capacity; COUNTY OF  
CONTRA COSTA; and CITY OF SAN  
RAMON.

#### Defendants.

Case No. C07-02669 CRB

**DEFENDANT INGRASSIA'S MOTION TO  
STRIKE PLAINTIFF'S PROFFERED  
EVIDENCE IN SUPPORT OF  
PLAINTIFF'S MOTION FOR A  
PROTECTIVE ORDER**

Date: December 7, 2007

Time: 10:00 a.m.

Judge: Hon. Charles R. Breyer

18       Defendant JASON INGRASSIA (“Defendant”) hereby submits this Motion to Strike  
19 portions of Plaintiff ABHINAV BHATNAGAR’s (“Plaintiff”) proffered evidence in support of  
20 Plaintiff’s Motion for Protective Order to exclude Defendant from personally attending the  
21 deposition of Mr. RICHARD HA (“Ha”), a third-party witness in this case. In support of  
22 Plaintiff’s motion for a protective order, he has submitted evidence that is objectionable so  
23 Defendant herein moves to strike that evidence or portions of that proffered evidence as follows:

## **Summary of Proffered Evidence to be Stricken**

- 25 A) Affidavit of Witness Richard Ha  
26 B) Portions of Affidavit of Plaintiff's Counsel Jenny Huang  
27 C) Declarations of Mr. Ahearn  
28 D) Affidavit of Ms. Garrido

## **I. LEGAL ARGUMENTS**

**A. Affidavit of Witness Richard Ha**

The entire Affidavit<sup>1</sup> of Mr. Richard Ha (“Ha”) should be stricken per this motion for several reasons, namely lack of authentication, lack of foundation and hearsay without an exception. First, Plaintiff has not authenticated and/or laid a proper foundation for Ha’s affidavit. The affidavit was submitted and purportedly signed personally by Ha on November 7, 2007. However, the affidavit is written in English and in his affidavit, Ha stated that he needed the assistance of a Vietnamese interpreter to review his prior testimony in this case. (Ha Affidavit ¶¶ 10, 15). Ha, through his newly retained counsel, Plaintiff’s counsel Ms. Huang, also requested the attendance of a Vietnamese interpreter for his upcoming deposition in this case. (Declaration of Fitzgerald, ¶ 19, filed herewith). These facts lead to the conclusion that Ha cannot read and understand English, but instead needs a Vietnamese interpreter. Despite this strong indication, nowhere in the affidavit does it indicate that the information in the affidavit was explained to Ha in his native language of Vietnamese so he could properly execute the affidavit. Without such a threshold showing by Plaintiff, Ha is not competent to provide an affidavit in English, nor has he shown that he possesses personal knowledge of the assertions in this affidavit which is written in English and not his native language of Vietnamese. There is no evidence submitted in the affidavit that indicates that Ha read and understood the English affidavit, thereby ensuring he has knowledge of its assertions. Per Federal Rule of Evidence 601 and 602, this affidavit should be stricken in total as these authentications and foundations have not been laid by Plaintiff.

In addition, this affidavit is garden variety hearsay without an exception, in violation of FRE 801-802. The affidavit includes many out of court assertions offered for the truth of the matters asserted, in violation of FRE 801-802. Moreover, as the affidavit was no doubt prepared by counsel for the Plaintiff, as Mr. Ha is not proficient in English, the affidavit is inherently not trustworthy so is not saved by the catch-all exception of FRE 807. All in all, as such affidavit lacks authentication, foundation and is hearsay without an exception, Ha's affidavit

<sup>1</sup> Note that Plaintiff labels his proffered evidence as either affidavits or declarations. Defendant will refer to the evidence per the labels of Plaintiff, knowing that affidavits and declarations are essentially the same thing. Also, all exhibits are attachd hereto to the Declaration of James V. Fitzgerald, III, Esq., filed herewith.

1 should be stricken and disregarded by the Court for Plaintiff's motion for a protective order. The  
 2 effect of such motion to strike should lead to summary denial of Plaintiff's motion as there would  
 3 be no remaining evidentiary basis to exclude Defendant from attending Ha's deposition.

4           **B. Portions of Affidavit of Plaintiff's Counsel Jenny Huang**

5           In support of Plaintiff's motion for protective order in this case, Plaintiff's counsel Jenny  
 6 Huang submitted an affidavit. In the affidavit, there are several portions of the affidavit that  
 7 indicate that Ms. Huang has personal knowledge about issues that she is relying to support  
 8 Plaintiff's motion. In that sense, the affidavit indicates that Ms. Huang is a percipient witness to  
 9 relevant issues in this case and pertaining to this motion, specifically, necessitating the need for  
 10 Defendant to take her deposition to properly oppose this motion, filed the day before the four day  
 11 holiday weekend of Thanksgiving. (Fitzgerald Decl. ¶¶ 2-3). Specifically, these assertions are  
 12 included in Paragraphs 14, 15, 24-26, 31 and 35-36 of the Huang Affidavit. As can be seen  
 13 below, these portions of the affidavit should be stricken.

14           For example, in Paragraph 14 of the Huang Affidavit, Ms. Huang indicates that at the  
 15 traffic citation hearing in March of 2007, she saw Defendant look at Plaintiff and herself in a  
 16 "hostile manner." She goes on to indicate in Paragraph 15 that in addition to seeing Defendant  
 17 look at Plaintiff in a "hostile manner," Defendant was also "smirking and snickering at Plaintiff  
 18 and even laughed at Plaintiff. Further, Ms. Huang also declares that she spoke to Ha on the  
 19 telephone and Mr. Ha "sounded terrified," per Paragraph 24 of her affidavit. She goes on to  
 20 discuss her meeting and conversation with Mr. Ha, as well as the circumstance of Ms. Huang  
 21 providing Mr. Ha with one photograph, of Defendant (a patent leading and suggestive action),  
 22 which made Mr. Ha confirm that the officer that came to his home on May 29<sup>th</sup> (the so called  
 23 "911" call for service) resembled Defendant. (See Huang Affidavit, ¶¶ 25-26).

24           In addition, in Paragraph 31, Ms. Huang asserts that Plaintiff was very anxious and  
 25 stressed that Defendant would be present for Plaintiff's deposition. In Paragraphs 35-36, Huang  
 26 states her opinions about the fact that the Defendant's presence during Plaintiff's deposition  
 27 affected Plaintiff's ability to focus his testimony, articulate, and caused fear and intimidation to  
 28 Plaintiff. These assertions transform Ms. Huang into a percipient witness in this case, especially

1 with regard to this motion.

2 As Ms. Huang indicated she was a perciptent witness, Defendant's counsel e-mailed Ms.  
3 Huang a letter and a deposition subpoena for her deposition on November 26<sup>th</sup> at 4:00 p.m., so  
4 Defendant could explore in deposition the foundation for Ms. Huang's assertions in her affidavit.  
5 (Fitzgerald Decl. ¶ 4). This letter and deposition subpoena is attached as Exhibit A to the  
6 Fitzgerald Declaration. (Fitzgerald Decl. ¶ 6). This letter was also personally served on Ms.  
7 Huang by a process server on the morning of November 26<sup>th</sup>. (Fitzgerald Decl. ¶ 5). On  
8 November 26<sup>th</sup>, at about 2:30 p.m., Defendant's counsel's office received a letter from Ms. Huang  
9 indicating that she would not appear for the deposition at 4:00 p.m. that day. (Fitzgerald Decl. ¶  
10 7). This letter from Ms. Huang is attached as Exhibit B to the Fitzgerald Declaration. (Fitzgerald  
11 Decl. ¶ 8). Ultimately, as Defendant was precluded from investigating the personal assertions in  
12 Ms. Huang's affidavit, those portions, namely Paragraphs 14, 15, 24-26, 31 and 35-36 of the  
13 Huang Affidavit, should be summarily stricken from consideration in the Court's evaluation of  
14 Plaintiff's motion for a protective order.

15 Similarly, such assertions by Ms. Huang are also objectionable and subject to the motion  
16 to strike in that they are hearsay statements without any exception per FRE 801-802. These  
17 assertions by Ms. Huang are offered for the proof of the matters asserted, namely that those  
18 actions were taken by Defendant and/or the feelings of Plaintiff. These statements are also  
19 garden-variety hearsay without an exception and subject to exclusion per FRE 801-802.

20 **C. Declarations of Mr. Ahearn**

21 The protective order motion filed by Plaintiff on November 21<sup>st</sup> initially included a one  
22 page signed declaration of Mr. Ahearn that included only 8 paragraphs. (Fitzgerald Decl. ¶ 9).  
23 This was signed at the bottom by Mr. Ahearn. This declaration did not include any detrimental  
24 facts in relation to Defendant. Then, on November 26<sup>th</sup>, only two days prior to the shortened  
25 deadline for Defendant to file an opposition to Plaintiff's motion, Plaintiff e-filed a second signed  
26 declaration of Mr. Ahearn that included 15 paragraphs. (Fitzgerald Decl. ¶ 10). That updated  
27 declaration included detrimental facts in relation to Defendant, facts which were not included in  
28 the originally filed declaration of Mr. Ahearn. This declaration is objectionable and Defendant

1 moves to strike it on several grounds as follows.

2 First, this 15 paragraph declaration was not included in the original filing by Plaintiff,  
 3 making this filed late and subject to being stricken by the Court per Local Rules filing deadlines.  
 4 After all, not only was this motion agreed to be heard and briefed on shortened time, but Plaintiff  
 5 filed this 15 paragraph updated declaration of Mr. Ahearn on November 26<sup>th</sup>, only two days prior  
 6 to Defendant's deadline to file an opposition to Plaintiff's extensive motion for a protective order.  
 7 Not only do local rules mandate that such updated declaration be stricken, but it should be  
 8 stricken in the interests of justice due to the fact that such late filing prejudices Defendant's  
 9 ability to adequately respond to its "updated" contents.

10 Secondly, these two signed declarations, one of which is signed after only 8 paragraphs  
 11 and one of which is signed after 15 paragraphs, ultimately contradict themselves, casting serious  
 12 doubt on the reliability of either declaration. For example, one includes no detrimental facts in  
 13 relation to Defendant and the other one includes facts about an alleged threatening stare. The  
 14 inconsistency between the two declarations makes them inherently unreliable and subject to being  
 15 stricken. Further, both declarations of Mr. Ahearn contain hearsay assertions that are not saved  
 16 by any hearsay exceptions. Per FRE 801-802, both declarations should be summarily stricken.

17 Finally, like Ms. Huang, Mr. Ahearn's declarations indicated he was a percipient witness  
 18 in this case. (Fitzgerald Decl. ¶ 11). Therefore, Mr. Ahearn was subpoenaed for deposition by  
 19 personally serving him with a deposition subpoena on November 26<sup>th</sup> for a deposition on  
 20 November 28<sup>th</sup> so Defendant could examine Mr. Ahearn regarding his assertions from his  
 21 declaration. (*Id.*). The deposition subpoena is attached as Exhibit C to the Fitzgerald Declaration.  
 22 (Fitzgerald Decl. ¶ 12). On November 28<sup>th</sup>, at just prior to 9 a.m., we received a brief letter, faxed  
 23 by Mr. Ahearn the night before around 9:00 p.m., indicating that he would not appear for his  
 24 deposition. (Fitzgerald Decl. ¶ 13). The letter from Mr. Ahearn is attached as Exhibit D to the  
 25 Fitzgerald Declaration. (Fitzgerald Decl. ¶ 14). As Mr. Ahearn also did not appear for his  
 26 properly subpoenaed deposition, this is yet another basis upon which the Court should strike his  
 27 declarations.

1                   **D. Affidavit of Ms. Garrido**

2                   Likewise, Ms. Garrido's affidavit should also be stricken. First, this affidavit includes  
 3 various hearsay assertions that are not saved by any hearsay exceptions. Per FRE 801-802, this  
 4 affidavit should be summarily stricken as hearsay.

5                   Further, like Ms. Huang and Mr. Ahearn, Ms. Garrido was identified as a percipient  
 6 witness in this case so she was subpoenaed for deposition by Defendant personally serving her  
 7 with a deposition subpoena on November 26<sup>th</sup> for a deposition on November 28<sup>th</sup> so Defendant  
 8 could examine her regarding her assertions from her affidavit regarding an interaction with  
 9 Defendant Ingrassia. (Fitzgerald Decl. ¶ 15). The deposition subpoena is attached as Exhibit E to  
 10 the Fitzgerald Declaration. (Fitzgerald Decl. ¶ 16). On November 27<sup>th</sup>, at just about 1 p.m., we  
 11 received a brief letter, faxed by Ms. Garrido, indicating that she would not appear for her  
 12 deposition. (Fitzgerald Decl. ¶ 17). The letter from Ms. Garrido is attached as Exhibit F to the  
 13 Fitzgerald Declaration. (Fitzgerald Decl. ¶ 18). As Ms. Garrido also did not appear for her  
 14 properly subpoenaed deposition, this is another basis upon which the Court should strike her  
 15 affidavit.

16                   **II. CONCLUSION**

17                   All in all, these proffered items of evidence submitted by Plaintiff are objectionable and  
 18 should be summary stricken herein as stated above.

19  
 20 Dated: November 28, 2007

21                   MCNAMARA, DODGE, NEY, BEATTY, SLATTERY,  
 22 PFALZER, BORGES & BROTHERS LLP

23 By:

24 James V. Fitzgerald, <sup>LL</sup>~~IL~~ Noah G. Blechman  
 25 Attorneys for Defendant  
 26 JASON INGRASSIA